

# 9-16.000

## PLEAS -- FEDERAL RULE OF CRIMINAL PROCEDURE 11

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## 9-16.001

### Legal Considerations

A defendant may plead guilty, not guilty, or with the consent of the court, nolo contendere. Fed. R. Crim. P. 11.

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**See the Criminal Resource Manual at 623 et seq. for a discussion of the law relating to pleas**

Pleas -- Federal Rule of Criminal Procedure 11	Criminal Resource Manual at 623
Plea Negotiations with Public Officials -- United States v. Richmond	Criminal Resource Manual at 624
Federal Rule of Criminal Procedure 11(e)	Criminal Resource Manual at 625
Plea Agreements and Sentencing Appeal Waivers -- Discussion	Criminal Resource Manual at 626 of the Law
Inadmissibility of Pleas: Federal Rule of Criminal Procedure 11(e)(6)	Criminal Resource Manual at 627

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### 9-16.010 Approval Required for Consent to Plea of Nolo Contendere

United States Attorneys are instructed not to consent to a plea of nolo contendere except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney

General responsible or by the Associate Attorney General, Deputy Attorney General, or the Attorney General. *See also* 9-27.500, Principles of Federal Prosecution.

### **9-16.015 Approval Required for Consent to Alford Plea**

United States Attorneys are instructed not to consent to a so-called "Alford plea," when the defendant maintains his or her innocence with respect to the charge to which he or she offers to plead guilty, except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, the Deputy Attorney General, or the Attorney General. *See North Carolina v. Alford*, 400 U.S. 25 (1970). In any case where the defendant tenders a plea of guilty but denies that he or she has in fact committed the offense, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty. *See* USAM 9-27.440 (Principles of Federal Prosecution); USAM 6-4.330 (Approval of Alford pleas in tax cases).

### **9-16.020 Approval Required for Plea Agreements Involving Members of Congress, Federal Judges, Extradition, Deportation, and Air Piracy Cases**

United States Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No United States Attorney or Assistant United States Attorney has the authority to negotiate regarding an extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, United States Attorneys or Assistant United States Attorneys, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division. *See* USAM 9-15.800, and 9-73.510.

The Department continues to advocate severe penalties for aircraft hijackers as a deterrent to future acts of piracy. Consequently, authorization from the Criminal Division must be obtained by the United States Attorney before he/she enters into any agreement to forego an air piracy prosecution in return for a guilty plea to a lesser offense, or decides otherwise not to fully prosecute an act of air piracy. *See* USAM 9-63.181.

For policy regarding approval required for plea agreements involving defendants who are Members of Congress, candidates for Congress, or Federal judges, see USAM 9-16.110.

### **9-16.030 Investigative Agency and Victim to be Consulted**

Although United States Attorneys have wide discretion in negotiating guilty pleas in criminal cases, this power should be exercised only after appropriate consultation with the federal investigative agency involved and with any known victim. *See* the Victim and Witness Protection Act of 1982, P.L. 97-291, § 6, 96 Stat. 1256.

### **9-16.040 Plea Bargains in Fraud Cases**

When possible, United States Attorneys should require an explicit stipulation of all facts of a defendant's fraud against the United States when agreeing to a plea bargain, including acknowledgement of the financial consequences or damages to the government. A good example of this approach and its usefulness in ensuing civil litigation may be found in *United States v. Podell*, 436 F. Supp. 1039, 1042-1044 (S.D.N.Y. 1977), *aff'd* 572

F.2d 31, 36 (2d Cir. 1978). Concerning such pleas, United States Attorneys should also be aware of USAM 9-2.159; 9-27.641 (Multi-District (global) Agreement Requests); 9-42.010 (Coordination of Civil and Criminal Fraud Against the Government); 9-42.451 (Plea Bargaining in Medicare/Medicaid Cases); and 9-16.030 (Investigative Agency and Victim to be Consulted).

## **9-16.050 Pleas by Corporations**

Charges against an individual defendant should not be dismissed on the basis of a plea of guilty by a corporate defendant unless there are special circumstances justifying the dismissal.

## **9-16.060 Miscellaneous Sections Requiring Consultation or Approval of Plea Agreements**

In addition to the sections listed above, see the USAM at 9-138.040, which states that the Secretary of Labor's statutory right to notice and representation in disability proceedings under 29 U.S.C §§ 504 and 1111 may not be waived or negotiated away as part of a plea agreement or sentencing bargain.

## **9-16.110 Plea Negotiations with Public Officials**

Plea bargains with defendants who are elected public officers can present issues of federalism and separation of powers when they require the public officer defendant to take action that affects his or her tenure in office. The same issues can also arise when the defendant is a candidate for elective office, or when plea negotiations call for withdrawal from candidacy or an undertaking by the defendant not to seek or hold public office in the future.

**GENERAL RULE:** Resignation from office, withdrawal from candidacy for elective office, and forbearance from seeking or holding future public offices, remain appropriate and desirable objectives in plea negotiations with public officials who are charged with federal offenses that focus on abuse of the office(s) involved. Where the office involved is *not* one within the Legislative or Judicial Branches of the federal government, such negotiated terms may be also be enforced involuntarily against the will of the defendant by a sentencing judge pursuant to the Federal Probation Act. *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979).

However, when the position that is the subject of a negotiated resignation, withdrawal from candidacy, or an agreement to forbear occupying future office, is a position within the Legislative or the Judicial Branches of the *federal* government (i.e., Member of Congress, United States Senator or federal judge), the inclusion of required withdrawal, resignation or forbearance may raise questions involving the separation of powers doctrine when included in a plea agreement negotiated by employees of the Executive Branch of government.

Resignation, withdrawal or forbearance from holding offices in the Legislative or the Judicial branches of the federal government may appropriately be made the subject of plea negotiations, and offers of resignation, withdrawal or forbearance concerning such offices may be incorporated into plea agreements with incumbent Members of Congress and federal judges. However, resignation, withdrawal or forbearance with respect to Congressional or federal judicial office may *not be imposed involuntarily* against the will of the judge or Member of Congress involved because of the separation of powers doctrine. See *Powell v. McCormack*, 395 U.S. 846 (1969); *United States v. Richmond*, 550 F. Supp. 144 (E.D.N.Y. 1982). See the Criminal Resource Manual at 624, for a discussion of *Richmond*.

To assure uniformity and fairness, all proposed plea agreements involving defendants who are Members of Congress, candidates for Congress, or federal judges shall be subject to prior approval by the Public Integrity Section of the Criminal Division.

The Public Integrity Section has substantial experience and expertise in the issues presented by taking pleas from federal public officials. Assistant United States Attorneys are encouraged to contact Public Integrity should questions arise concerning this issue.

### **9-16.300 Plea Agreements -- Federal Rule of Criminal Procedure 11(e)**

Federal Rule of Criminal Procedure 11(e) recognizes and codifies the concept of plea agreements. Plea agreements should honestly reflect the totality and seriousness of the defendant's conduct, and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate Sentencing Guideline provisions. *See* USAM 9-27.400. The Department's policy is to stipulate only to facts that accurately represent the defendant's conduct. *See* USAM 9-27.430. In addition, in accordance with USAM 9-27.630, United States Attorneys may not make agreements which prejudice civil or tax liability without the express agreement of all affected Divisions and/or agencies. For additional discussion regarding plea agreements, see the Principles of Federal Prosecution, USAM 9-27.400 et seq. See the Criminal Resource Manual at 625 for additional discussion of the law relating to plea agreements.

### **9-16.320 Plea Agreements and Restitution**

The Antiterrorism and Effective Death Penalty Act of 1996, specifically Title II, Subtitle A, the Mandatory Victims Restitution Act ("the Act"), amended restitution laws and, by altering 18 U.S.C. § 3663 et seq., strengthened enforcement. On July 24, 1996, in response to a Congressional directive in the Act, the Attorney General issued a memorandum to all Department of Justice Attorneys and Victim-Witness Coordinators that addressed, among other things, plea agreements and restitution. The following language was taken from that memorandum:

Section 209 of the Act mandates that when negotiating plea agreements, prosecutors must give consideration to "requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the count to which the defendant actually plead[s]." In addition to this mandate, the following general guidelines summarize the responsibilities of prosecutors with regard to plea agreements that include provisions regarding restitution:

First, 18 U.S.C. § 3663A mandates that restitution be ordered for crimes of violence, for offenses against property under the criminal code (unless the court makes a special finding described in subsection (c)(3) of that section), and for offenses described in 18 U.S.C. § 1365, if an identifiable victim or victims suffered a physical injury or pecuniary loss. There are also several other previously enacted statutes that mandate restitution: 18 U.S.C. § 2248; 18 U.S.C. § 2259; 18 U.S.C. § 2264; and 18 U.S.C. § 2327. In cases that fall under these statutes, the court is obligated to impose a restitution order.

Second, even when restitution is not mandatory, federal prosecutors should give careful consideration to seeking full restitution to all victims of all charges contained in the indictment or information as part of any plea agreement.

Third, when an indictment contains both charges for which restitution is mandatory, and charges for which restitution is not mandatory, prosecutors should give careful consideration to requiring either a plea to a mandatory restitution charge, or an acknowledgement by the defendant in the plea agreement that a mandatory

restitution charge gave rise to the plea agreement, which acknowledgement will trigger the mandatory restitution provisions of 18 U.S.C. § 3663A. 18 U.S.C. § 3663A(c)(2).

Fourth, prosecutors should also be mindful that the United States Sentencing Guidelines (USSG) generally require the imposition of restitution when it is authorized by the law, and should not enter into agreements regarding restitution that would violate the Sentencing Guidelines. *See* USSG § 5E1.1; USAM 9-27.400.

Supervisory attorneys who approve plea agreements, as is required by the Principles of Federal Prosecution (USAM 9-27.450), should ensure that plea agreements comply with the law and these guidelines. The Principles of Federal Prosecution list the factors that should be considered when determining whether to enter into a plea agreement. These factors include, among other factors, the effect the plea agreement will have upon a victim's right to restitution. USAM 9-27.420-430.

### **9-16.330 Plea Agreements and Sentencing Appeal Waivers**

Some districts incorporate waivers of sentencing appeal rights and post-conviction rights into plea agreements. The use of these waivers in appropriate cases can be helpful in reducing the burden of appellate and collateral litigation involving sentencing issues. See the Criminal Resource Manual at 626 for a more extensive discussion of the law on this issue.

### **9-16.400 Inadmissibility of Pleas: Federal Rule of Criminal Procedure 11(e)(6)**

*See* the Criminal Resource Manual at 627.